IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted] 442

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

CARL L. YAEGER,
Baker Building,
Minneapolis 2, Minnesota,
Attorney for Petitioner.

ROBERT J. RAFFERTY,
Chicago, Illinois,
Of Counsel.

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

THE QUESTIONS PRESENTED FOR REVIEW BY RESPONDENT.

Questions 1 and 2 presented by respondent are immaterial to a decision of the case. The plaintiff was not obligated to prove notice by defendant of a defective condition created by the defendant in its own roadbed. The Court of Appeals in its decision recognized this when it said:

> "But to prevail, it was incumbent on plaintiff to adduce evidence that the hazardous condition was produced or permitted to continue by reason of defendant's negligence." (Appendix, Petition for Writ of Certiorari, Page 12)

No where in Respondent's brief is a case cited which holds that a *tort feasor* is entitled to notice of his own wrong doing.

The only real issue in dispute between the parties during the trial and on appeal was whether or not there was evidence from which a jury could reasonably infer that respondent negligently created a condition which caused injury to petitioner.

RESPONDENT'S STATEMENT OF THE CASE.

Respondent has searched the record for facts, and inferences from facts, favorable to it. It would like this Court to believe that the clinker which injured petitioner was not imbedded and concealed in its roadbed.

The evidence favorable to petitioner says:

> "I took one step and stepped on a cinder buried in the loose cinders." (Pl. Ex. 2, R. 65, 110)

Respondent indicates that the repairs had not extended to the scene of the accident.

Evidence favorable to petitioner states:

> "This track had been worked on shortly before this by the trackman and the cinders were stirred up and loose and this large cinder about six inches in circumference was buried in loose cinders around it so that it was not discernible * * *." (P. Ex. 2, R. 65, 110)

Respondent cites evidence of the frequency of inspection of the premises by its employees. These inspections were made from moving motor cars. (R. 79, 84).

Failure of the inspectors to find the clinker buried in respondent's roadbed does not prove that it was not so buried and concealed but it does strongly indicate that the clinker was not resting on top of its roadbed where it might be expected to be found if placed by a stranger or another railroad.

REASONS FOR GRANTING THE WRIT.

A reading of the Record or of the Statements of the Case filed by each party shows that a factual dispute existed between the parties and that different inferences and conclusions could be drawn from the disputed and undisputed facts.

The numerous cases cited by petitioner on pages 6, 7 and 8 of his Petition demonstrate that this Court has time and again directed Courts of Appeal and trial courts to allow juries to settle this type of dispute.

A large portion of respondent's brief is devoted to its contention that the verdict for petitioner rested upon speculation and conjecture alone.

The petitioner, not the respondent, should and does complain about speculation and conjecture.

Petitioner as shown by his Petition for Writ of Certiorari (P. 3 and 4) demonstrated that he was injured by stepping on a large clinker buried in a new, soft roadbed constructed by respondent's employees about three weeks before the accident in question. His evidence showed that respondent's employees used 15 cubic yards of unscreened cinders in raising its track and roadbed five inches. Petitioner and respondent's witnesses testified that a clinker as described did not belong in a roadbed and made for an unsafe place to work.

From these probative facts the jury could and did infer that respondent negligently maintained its roadbed and thereby failed to furnish petitioner a reasonably safe place to work.

The Court of Appeals held that plaintiff's probative evidence was conjectural and speculative apparently because it did not negate possible acts of negligence of strangers or another railroad.

To reason that a stranger or other railroad might or would come on respondent's property and bury a clinker in its roadbed for no apparent reason or motive is speculation and conjecture of the worst sort.

Brown v. *Western Ry. of Alabama,* 338 U. S. 294 (1949) and *Southern R. Co.* v. *Puckett,* 244 U. S. 571 (1916), are not "inapposite" as indicated by the Court of Appeals.

In *Brown* v. *Western Ry. of Alabama,* 338 U. S. 294 (1949), a complaint was dismissed because it allegedly failed to state a cause of action against the defendant.

This Court reversed the Georgia Courts saying at page 297:

> "Other allegations need not be set out since the foregoing if proven would show an injury of the precise kind for which Congress has provided a recovery. These allegations, fairly construed, are much more than a charge that petitioner 'stepped on a large clinker lying alongside the track in the railroad yards.' They also charge that the railroad permitted clinkers and other debris to be left along the tracks, 'well knowing' that this was dangerous to workers; that petitioner was compelled to 'cross over' the clinkers and debris; that in doing so he fell and was injured; and that all this was in violation of the railroad's duty to furnish petitioner a reasonably safe place to work. Certainly these allegations are sufficient to permit introduction of evidence *from which a jury might infer* that petitioner's injuries were due to the railroad's negligence in failing to supply a reasonably safe place to work. *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353. And we have already refused to set aside a judgment coming from the Georgia Courts *where the jury was permitted to infer negligence* from the presence of clinkers along the tracks in the railroad yard. *Southern R. Co.* v. *Puckett,* 244 U. S. 571, 574, affirming 16 Ga. App. 551, 554, 85 S. E. 809, 811" (Emphasis supplied)

The *Puckett case,* just cited, involved an employee tripping over three large clinkers on a roadbed.

This Court affirming the trial court (244 U. S. 571) said at page 574:

> "It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two State courts."

A doctrine of "probabilities" is used by the Court of Appeals to justify its conclusion that petitioner did not maintain his burden of proof. (Appendix, Petition for Writ of Certiorari, P. 15) To distinguish between "possibilities" and "probabilities", as does the Court of Appeals, requires weighing and evaluating of evidence which this Court has said time and again is the function of a jury.

The only case which respondent has been able to find which lends support to the doctrine of "probabilities" is *Patton* v. *Texas and Pacific R. Co.,* 179 U. S. 658 (1900).

This case pre-dated the Statute upon which petitioner's cause of action is predicated. (Appendix, Petition for Writ of Certiorari, p. 19, 20). While not specifically overruled, it has been swept into discard by the recent decisions of this Court cited on page 6 of the Petition. These cases hold that if there is any evidence in the record standing alone and by itself, from which a jury might reasonably infer that a defendant was negligent, then the jury must decide the case.

In *Bailey* v. *Cent. Vt. Ry.*, 319 U.S. 350, it was said, with reference to a jury trial:

> "It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Schulz, Administrator v. *Pennsylvania R. Co.* decided by this Court on April 9, 1956 (No. 282 October Term, 1955) states:

> "In considering the scope of issues entrusted to juries in cases like this, it must be born in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the

tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888)."

Near its conclusion the opinion holds:

"Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

It is petitioner's sincere belief that a fact question existed for a jury and that the Court of Appeals erred in depriving him of his jury verdict.

CONCLUSION.

For the reasons set forth above and in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

CARL L. YAEGER,
Baker Building
Minneapolis 2, Minnesota
Attorney for Petitioner.

ROBERT J. RAFFERTY,
Chicago, Illinois,